IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 66

MARCEL MAX LUTWAK, MUNIO KNOLL, AND REGINA TREITLER,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR PETITIONERS.

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OPINIONS BELOW.

The original opinion of the Court of Appeals for the Seventh Circuit, dated January 3, 1952 (R. 391-400), and the supplemental opinion, dated April 16, 1952 (R. 404-14), are reported at 195 F. 2d 748 (C. A. 7th, 1952).

JURISDICTION.

The judgments of the Court of Appeals were entered on January 3, 1952 (R. 401-03). A petition for rehearing was filed on January 18, 1952 (R. 403). It was denied on April 16, 1952 (R. 415).

The petition for a writ of certiorari was filed on May 16, 1952, and was granted on October 13, 1952. 73 S. Ct. 13. Jurisdiction in this Court is conferred by 28 U. S. C., § 1254 (1).

QUESTIONS PRESENTED.

1. Are wives competent to testify against their husbands in a federal criminal case involving no personal wrong to the wives?

2. Is it proper for the wives of defendants in a federal criminal case, although presumed to be *prima facie* incompetent as witnesses, to testify as to the very facts necessary to establish their competency, when those facts constitute a major portion of the evidence with respect to the principal issue to be determined by the jury?

3. Are the acts and declarations of a conspirator after the termination of a conspiracy and not in furtherance of it admissible against absent co-conspirators on the question of their intent to conspire?

4. In a federal criminal case, in which the government is seeking to establish the invalidity of marriages contracted in a foreign country, is not the burden upon the government to prove such invalidity under the applicable foreign law, and does not that burden require the government to prove the foreign law?

5. Where two marriages are shown, is it not the presumption that the second marriage is valid, and is not the burden on the party attacking such second marriage to overcome the presumption that the first marriage was dissolved? Is not an instruction which fails to indicate to the jury that there is a presumption in favor of the second marriage erroneous?

STATUTES INVOLVED.

Title 8, U. S. C., Section 180a:

> Any alien who after March 4, 1929, enters the United States at any time or place other than as designated by immigration officials or eludes examination or inspection by immigration officials, or obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact, shall be guilty of a misdemeanor and, upon conviction, shall be punished by imprisonment for not more than one year or by a fine of not more than $1,000, or by both such fine and imprisonment.

Title 8, U. S. C., Section 220(c):

> Whoever knowingly makes under oath any false statement in any application, affidavit, or other document required by the immigration laws or regulations prescribed thereunder, shall, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both.

Title 18, U. S. C., Section 88 (the revised Criminal Code provision is 18 U. S. C., Section 371 (1948)):

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

Title 8, U. S. C., Section 232:

> Notwithstanding any of the several clauses of section 136 of this title, excluding physically and mentally defective aliens, and notwithstanding the documentary requirements of any of the immigration laws

or regulations, Executive orders, or Presidential proclamations issued thereunder, alien spouses or alien children of United States citizens serving in, or having an honorable discharge certificate from the armed forces of the United States during the Second World War shall, if otherwise admissible under the immigration laws and if application for admission is made within three years of December 28, 1945, be admitted to the United States. . . .

STATEMENT OF THE CASE.

The three petitioners were convicted by a jury sitting in the United States District Court for the Northern District of Illinois, Eastern Division (R. 358-60), and given sentences of two years imprisonment and fines of $10,000 each (R. 366-67). These convictions were based upon the first count, charging a conspiracy in violation of Title 18, U. S. Code, Section 88 (R. 4-9), of what had originally been a six-count indictment. The judgments of conviction were affirmed by the Court of Appeals for the Seventh Circuit (R. 401-03).

Count I charged the petitioners, together with Grace Klemtner Knoll and Leopold Knoll, with conspiring (1) to commit the offences set forth in the five substantive counts, and (2) to defraud the United States of and concerning its governmental function and right to administer the immigration laws and the Immigration and Naturalization Service of the Department of Justice honestly and free from fraud (R. 4-5).

Count I also charged that "it was further a part of said conspiracy that the said defendants would at all times subsequent to the formation of said conspiracy conceal such transactions and acts aforesaid and would do such other, further and different acts as they might deem necessary and expedient to prevent the disclosure to the United States Immigration and Naturalization Service of the existence of said conspiracy." (R. 7).

The five substantive counts charged petitioners with securing the illegal entry under the War Brides Act (Title 8, U. S. Code, Section 232) at the Port of New York of two aliens—Leopold Knoll and the petitioner Munio Knoll—

by means of false and misleading representations and the concealment of material facts with respect to the marital status of the aliens, in violation of Title 8, U. S. Code, Section 180a; and with making false statements under oath concerning those aliens' and Maria Knoll Lutwak's marital status in applications required by the immigration laws of the United States, in violation of Title 8, U. S. Code, Section 220(c) (R. 9-14).

In effect, the indictment, taken as a whole, charged that the petitioners, and Leopold Knoll and Grace Klemtner Knoll, had conspired to arrange and had arranged "ostensible marriages" between discharged veterans and aliens for the purpose of securing the entry of the aliens into the United States under the War Brides Act.

The conspiracy, according to the indictment, involved Marcel Lutwak's journeying to Paris to "go through the form of a marriage ceremony with Maria Knoll" in order to permit her to enter the United States as the alien spouse of a United States citizen having an honorable discharge from the armed forces (R. 5); Bessie Osborne's going to Paris for the similar purpose of going through a marriage ceremony with Munio Knoll and bringing him to the United States as the alien spouse of an honorably discharge veteran (R. 6); and Grace Klemtner's travelling to Paris in order to go through a marriage ceremony with Leopold Knoll and to bring him into the country as the alien spouse of an honorably discharged veteran (R. 6). These marriages were to be "ostensible marriages", that is, "marriages in form only" and were to be "entered into by the parties thereto solely for the purpose of representing them as marriages to the United States Immigration and Naturalization Service" (R. 6).

Grace Klemtner Knoll was dismissed from the indictment prior to trial on the ground that her constitutional

privilege against self-incrimination had been invaded at the time she was taken before the Grand Jury (R. 18, 224-25). Various other motions to dismiss were denied (R. 18-19).

At the trial, when the government had concluded its case, petitioners moved for acquittal on the substantive counts on the ground, among others, that proper venue had not been proved (R. 288). The court declined to enter judgments of acquittal but did dismiss all five substantive counts for the reason that proper venue, which would have been the Southern or Eastern District of New York, had not been shown (R. 290-91).

The petitioners, as defendants, offered no evidence, and the court presented the case to the jury on the conspiracy count alone (R. 333). In separate verdicts, the jury found Leopold Knoll not guilty and Marcel Max Lutwak, Munio Knoll, and Regina Treitler, the petitioners herein, guilty as charged in Count I of the indictment (R. 358-61).

THE EVIDENCE.

Munio Knoll, Leopold Knoll, and Regina Treitler are brothers and sister, and Marcel Lutwak is their nephew (R. 61). The latter two are, and in 1947 were, citizens of the United States, having resided in this country for a number of years. Marcel Lutwak, in 1947, was an honorably discharged veteran (R. 62). In the summer of 1947, Munio Knoll and Leopold Knoll, having been driven from their homes in Poland by the war and having for a time been held in Nazi concentration camps, were living as refugees in Paris (R. 29, 36, 60-61). Maria, who had been married to Munio Knoll in Poland in 1932, was also residing in Paris (R. 60). At this time the other participants, Bessie Osborne and Grace Klemtner, were American citizens residing in Chicago after having been honorably discharged from the armed forces (R. 190, 226-27).

Although only three marriages are charged to have been "ostensible" marriages, a proper understanding of the issues requires consideration of a fourth marriage, *i. e.*, that of Munio Knoll and Maria. The evidence as to all four of these marriages is set out below.

The Marital Status of Munio Knoll and Maria.

Maria testified that she and Munio Knoll had been married in Poland in 1932, in a strictly religious ceremony performed by a rabbi (R. 60, 72). Although the Assistant United States Attorney advised the jury in his opening statement that the evidence would show that Munio and Maria had obtained "during the war what is known as a rabbinical divorce in Budapest" (R. 23), he purposely refrained from asking Maria any questions with respect

to such a divorce and even successfully objected to any cross-examination concerning it (R. 73, 78). On the basis of Maria's testimony, therefore, the jury learned only that Maria had married Munio Knoll in Poland in 1932 and Marcel Lutwak in Paris in 1947 (R. 60).

The statements of Munio Knoll before the immigration and naturalization authorities, which were admitted into evidence against him and read to the jury, indicated, however, that some kind of divorce proceeding had taken place in Budapest in 1942 (Gov't Ex. Nos. 13 and 14, R. 281-82).

With this evidence in the record, the Court of Appeals stated that whether Maria "had been legally divorced from * * * [Munio] is not determinable from the record" (R. 393, fn. 1), and in its opinion spoke of Maria as the "undivorced or divorced wife" of Munio (R. 393).

At the time of the colloquy in the trial court concerning the competence of Maria to testify, the Assistant United States Attorney declined to indicate whether or not the government contended that Munio and Maria were never validly divorced and hence lacked the capacity to remarry, although he did state to the court that according to his information a rabbinical divorce was not recognized in Hungary as a civil divorce (R. 42-43).

Marcel Lutwak and Maria.

The only direct testimony relating to the marriage of Marcel Lutwak and Maria in 1947 came from Maria as a government witness. Maria testified that she and Marcel met in Paris at the end of July or the beginning of August 1947 (R. 60-61). During a courtship of approximately four weeks, Marcel and Maria fell in love and were married (R. 60, 76). The marriage ceremony, which took place in Paris in August, was performed by civil authorities, and

Maria received no wedding ring (R. 60, 62). The marriage was consummated (R. 78), and the couple lived in Paris as man and wife (R. 82).

Marcel and Maria entered the United States at the Port of New York on September 9, 1947. After they had filled out and submitted the forms required by the immigration authorities, Maria was admitted as the spouse of an honorably discharged veteran (R. 62-64). They journeyed to Chicago (R. 64), where they were met at the railroad station by members of the family (R. 90). Maria thereupon went to Mrs. Treitler's home at 35 South Central Park Avenue. Marcel did not go with her (R. 65). Thereafter, although Marcel and Maria spent a great deal of time together (R. 84), they resided at different addresses (R. 65, 69). For a time Maria lived with a Mrs. Sager, a sister of Mrs. Treitler (R. 65), and later she obtained an apartment on West Maypole Street (R. 65-66). In February 1948, Maria went to New York (R. 66), returned to Chicago in June to see her husband Marcel, and then took up permanent residence in New York in November of 1948 (R. 69).

Maria's testimony, together with that of government witnesses Ludmer, Haberman, and Wicker, indicated that for periods, while Maria lived with Mrs. Treitler and subsequently in the apartment at West Maypole Street, Munio Knoll lived at the same places (R. 65, 66, 69, 104-05, 177). The rent on the apartment on West Maypole Street was paid originally by Maria and then by Munio (R. 141). It consisted of a large bedroom, a large living room, a kitchen, and a bathroom (R. 140). At various times Maria and Marcel, or Maria and Munio, or all three of them were observed at the apartment (R. 118, 140).

On several occasions, Munio Knoll held Maria out to be his wife (R. 153, 172), attended night clubs with her (R.

176, 178), and was with her in hotels in New York City (R. 165, 167). During the summer of 1948 Munio Knoll and Maria visited friends in Michigan and spent the night together in the same room (R. 143).

Witness Ludmer also testified that he saw Marcel Lutwak with a plaster cast on his arm (R. 98) the day after Marcel was supposed to have jumped out of a window at the West Maypole Street apartment when Munio found him there with Maria (R. 99-101, 169-70). This latter item of evidence, which consisted of witness Ludmer and witness Haberman relating what Munio Knoll had said in conversation, was admitted against Munio alone (R. 99).

In April of 1950 Marcel Lutwak obtained a divorce from Maria (R. 70).

Munio Knoll and Bessie Osborne.

In the late summer of 1947, a Mrs. Zapler was approached by the petitioner Regina Treitler and asked if she knew of any girl willing to go to Europe to bring back a brother of Mrs. Treitler's who had been starved and beaten (R. 30, 31). Mrs. Treitler indicated that she wanted a girl who had been in service and said that she would pay the girl her expenses and a fee; Mrs. Treitler also stated that the marriage need not be consummated and that after six months there could be a divorce (R. 37-38).

In the latter part of September, Mrs. Zapler introduced Bessie Osborne, a former Wave, to Marcel Lutwak, who had recently returned from Europe where he had married Maria (R. 32-33, 193). Marcel at that time asked Bessie Osborne if she would go to Europe to marry his uncle, who was in need of medical care, and to bring him to the United States. He said he would pay her $1,000.00 for doing this (R. 193). Mrs. Treitler later made the same request of

Bessie Osborne (R. 194-95). These requests originally had to do with Bessie's going to Paris to marry Leopold, and she had been told that it might be a true marriage, involving romance (R. 220). Later, however, Marcel asked her to marry the other uncle, Munio, rather than Leopold (R. 196). Bessie agreed to go and left for Paris by plane, together with Mrs. Treitler, on October 25, 1947 (R. 198). Bessie's ticket was paid for and she received money for clothes (R. 196-97).

Approximately a week after arriving in Paris and meeting Munio Knoll, Bessie Osborne and Munio were married in a civil ceremony (R. 191). Bessie did not receive a wedding ring (R. 199). Prior to the marriage the necessary arrangements were made at the office of a lawyer in Paris and at the American Consulate (R. 199). After the marriage Bessie continued to live by herself in a room at the Khedive Hotel and then at the Royal Monceau Hotel (R. 200). She testified that the marriage was not consummated and that Munio and she never lived as man and wife (R. 210).

Bessie and Munio returned to the United States via Brussels, traveling by plane. They entered at the Port of New York on November 13, 1947, at which time the documents required for Munio's admission were filled out (R. 203). From New York Munio and Bessie flew directly to Chicago, where they separated (R. 204). Approximately three days after arriving in Chicago, Bessie, Munio, and Marcel Lutwak met at a downtown restaurant, and Marcel gave Bessie a check for $1,000.00 (R. 205-06).

In May of 1950 Bessie began a divorce suit against Munio (R. 208). About six months after their return to the United States, Munio had asked Bessie to delay getting a divorce for two years because he wanted to become an American citizen, and Bessie agreed (R. 208). Later, some-

time in 1950, Bessie asked Munio not to oppose her divorce, and Munio asked her to wait until after the trial (R. 209). The first of these two conversations was admitted against all the defendants (R. 208), but the latter was admitted only as against Munio (R. 209).

Leopold Knoll and Grace.

Grace Klemtner and Mrs. Treitler were acquaintances for a number of years (R. 238). Approximately one month before Mrs. Treitler left for Europe, she informed Grace that she was going. Grace decided to go about the same time, and she and Mrs. Treitler talked about the trip (R. 229). Grace told Marcel that she was planning to travel to Europe (R. 233). Marcel assisted her in applying for her passport (R. 236-37), and took her to the airport on November 1, 1947 (R. 234). Marcel did not inform Grace that he himself had recently been to Paris and had been married there (R. 234).

Testifying as a court's witness, Grace refused to state on grounds of possible self-incrimination whether she had talked with Marcel Lutwak or Mrs. Treitler about Leopold Knoll before leaving for Paris (R. 247). For the same reason she refused to tell where she had obtained the money to pay for her ticket (R. 242). She did state, however, that she never received any money from Marcel other than a small loan (R. 247).

Upon arriving in Paris on November 2, 1947 (R. 246), Grace was met by Mrs. Treitler and Leopold Knoll (R. 230). Grace stayed at the Khedive Hotel, where Mrs. Treitler had arranged a room for her (R. 229, 249). While in Paris she met Bessie Osborne (R. 245), and Bessie was present at a conversation between Leopold and Grace when Leopold told Grace that he would not marry her if it were not going to be permanent and if Grace's only purpose

were to get him into the United States (R. 216, 259). Grace then agreed to marry Leopold for "all time to come" (R. 259), and the ceremony was performed in Paris on November 6, 1947 (R. 247). The marriage was consummated in Paris (R. 260). Grace did not receive a wedding ring from Leopold (R. 246).

Grace and Leopold returned to the United States on December 5, 1947, entering at the Port of New York, where the necessary immigration forms were prepared (R. 251-52). After entry, Grace and Leopold went to different hotels in New York (R. 254). Grace went to Chicago and then to California with her friend Jane Turner (R. 254-55). Grace's decision to go to California was occasioned by difficulties between her and Leopold; Grace wanted to get away from his family, thinking that would facilitate the necessary adjustments between herself and Leopold (R. 263). For a while she worked in Los Angeles (R. 256), and then began college there under the GI Bill (R. 263). Leopold did not visit Grace in Los Angeles (R. 257), but he corresponded with her and sent her money (R. 138, 263-64). Although Leopold and Grace did not commence living as man and wife upon arriving in the United States, they did live together on several occasions after April of 1950, when Grace first came to Chicago to testify before the grand jury (R. 257, 260). Grace also testified that she wanted to live with Leopold as his wife permanently (R. 260), and that Leopold had indicated to her his intention to live with her (R. 261).

PETITIONERS' OBJECTIONS WITH RESPECT TO THE EVIDENCE AND PROOF.

The questions which petitioners have raised and which are now before this Court for determination relate either to the admission of certain kinds of evidence or to the burden of proof imposed upon the prosecution by the indictment.

Taking up these questions in the order in which they appear above under "Questions Presented," the problems may be stated as follows:

1. The question as to the competency of a wife to testify against her husband in a federal criminal case involving no personal wrong to the wife arises because Maria (possibly still the wife of Munio), Bessie Osborne (possibly the wife of Munio), and Grace Klemtner Knoll (the wife of Leopold) all testified over objection (R. 41-42, 56-57, 187, 225). Furthermore, the record indicates that Maria and Grace were unwilling witnesses who testified only because compelled to. Thus, Maria, immediately upon being called to the stand, stated that she wished to talk to the judge, a request the judge declined to grant (R. 40). Grace was called as a court's witness, having been subpoenaed in California for the trial, stated to the court that she believed she needed counsel, and declined to answer several questions for fear of possible self-incrimination (R. 224-26, 240-42, 247, 264). Moreover, Grace had originally been indicted as a co-conspirator (R. 4-9) and had been dismissed from the indictment because of the prosecution's infringement of her constitutional rights (R. 18, 224-25).

Necessarily, insofar as this problem relates to the competency of Maria as a witness, the marital status of Maria

and Munio is involved. The facts concerning that status have been set out above.

2. The problem of the competency of a wife, the validity of whose marriage to a defendant is disputed by the prosecution, to testify before the jury without any prior *voir dire* examination as to such facts as show the invalidity of the marriage and thus her competency as a witness, where that very issue of invalidity is one of the key questions to be resolved by the jury, is presented by the testimony of Bessie Osborne (R. 190-226) and Grace (R. 226-67). For their testimony, significant portions of which have been summarized above under the respective headings "Munio Knoll and Bessie Osborne" and "Leopold Knoll and Grace," in large part had to do with the circumstances of their marriages, which circumstances, such as the absence of wedding rings (R. 199, 246), might indicate to the jury that the marriages were invalid. The invalidity of the marriages was a prerequisite to the witnesses' competency. It was also an essential element in the government's case. In fact the instructions given by the trial court as to the meaning of marriage related in large part to the elements making for the validity or invalidity of a marriage (R. 339-40).

Moreover, the Court of Appeals, in its original opinion, stated that "The contest in the trial court centered largely about these two factual questions, viz., did defendants conspire and, if so, did the Government prove by competent evidence that the marriages were in fact invalid" (R. 392). The Court of Appeals also said that "before the jury could properly conclude that the scheme became an illegal conspiracy, it was necessary that the evidence be sufficient to justify a conclusion that the three marriages were void, of no legal effect, and that they were so intended, for, if they were valid, the Government cannot complain" (R. 395).

Requests for *voir dire* examinations were refused (R. 187-89, 225-6).

3. The question as to the admissibility against absent conspirators of acts and declarations of a co-conspirator after the termination of a conspiracy and not in furtherance of it arises directly from the indictment itself as well as from the nature of much of the government's proof. The indictment charged a continuing conspiracy to conceal the existence of the major conspiracy (R. 7), apparently right up to the date of the indictment (R. 4), and listed overt acts which took place over two years after the entry of the three aliens into the United States (R. 9). Much of the evidence of government witnesses Maria Lutwak (R. 58-92), Ludmer (R. 92-130), Turner (R. 130-38), Wicker (R. 138-45), Haberman (R. 150-84), Bessie Osborne (R. 186-226), and Grace Klemtner Knoll (R. 226-67) had to do with acts and events long after the entries. Despite objection such testimony was admitted against all (R. 282-84, 286-88). Thus evidence that Marcel and Maria resided at different addresses and that Munio and Maria lived at the same apartment (R. 65-66, 69, 104-05, 177), that Munio did not live with Bessie Osborne (R. 210), and that Leopold and Grace lived apart (R. 135-37, 250-60) was admitted generally against all. Likewise, photographs of certain of the petitioners, taken in night clubs in New York and Chicago and showing Munio and Maria together, were admitted against all the defendants (Gov't Exs. Nos. 22, 23, 24 and 25, R. 160-61, 168-69, 176, 178, 181-84, 280, 287).

In addition, statements of one conspirator in the absence of the others, which were either not in furtherance of the conspiracy or were subsequent to the entries of the aliens into the United States, were admitted against all defendants. Thus Bessie Osborne testified that Munio had

asked her to delay divorce proceedings until after he obtained citizenship (R. 208-09). And witness Haberman testified that Munio Knoll had said upon one occasion that it was easy to secure entry into this country if you knew how (R. 160).

Another declaration of Munio Knoll, to the effect that upon returning to Chicago from New York one time he had found Marcel in bed with Maria and that Marcel jumped out of the window, was admitted against Munio alone (R. 99-101, 169-70). Yet that declaration, which was testified to by witnesses Ludmer and Haberman, was plainly coupled, as was intended, with the testimony of witness Ludmer to the effect that he had seen Marcel Lutwak in bed with a plaster cast on his arm just after the event Munio spoke about (R. 98). This testimony concerning Marcel's arm was admitted generally.

In connection with the evidence of this kind, which petitioners contend was after the termination of the conspiracy and not in furtherance of it, the trial court, insofar as it indicated any reasons for ruling it admissible, seemed to accept the government's view that it could be admitted under the charge in the indictment of a continuing conspiracy to conceal (R. 67-68, 280-81).

4. The question relating to the burden upon the government to prove the marriages invalid under the applicable foreign law and thus to prove the foreign law arises from the fact that although the three marriages under attack took place in Paris, France, nothing at all with respect to French law was introduced into evidence. When this problem was raised by defense counsel at the trial, the court ruled that it would assume the law of Paris, France to be the same as that of Chicago, Illinois (R. 189).

5. The objection that the court failed to advise the jury that where two marriages are shown the presumption is that the second is valid, in the absence of evidence show-

ing that the first marriage was not dissolved, has to do with instruction No. 22 as offered by the government and given by the court (R. 339, 354). That instruction reads: "The marriage of a man and a woman where one of the parties thereto has a husband or wife by a prior marriage who is then living and undivorced is void."

Inasmuch as the only possible application of this instruction is to the uncertain marital status of Maria and Munio and their resulting capacity or incapacity to remarry, the facts in the record on that point, set out above, are important. Assuming that there is a presumption in favor of a second marriage, then with respect to the marriages of Munio to Bessie and of Marcel to Maria, both Munio and Maria would be regarded as possessing the capacity to remarry, even in the absence of any showing that they had been divorced. Such a presumption would put the burden on the government to show that Munio's and Maria's marriage had not been dissolved.

Instruction No. 22 was given over the specific objection that it failed to advise the jury of such a presumption (R. 304-05).

SUMMARY OF ARGUMENT.

I.

The last of the three aliens entered the United States on December 5, 1947. By that time all the misrepresentations, concealments, and false statements claimed to have been made by the various conspirators had occurred. Thus, since the objective of the conspiracy had been attained, the conspiracy terminated on that date. *Krulewitch* v. *United States*, 336 U. S. 440, 442 (1949). Acts and declarations of the conspirators subsequent to that date were therefore not admissible against absent co-conspirators, since not in furtherance of the conspiracy.

Nevertheless, a major portion of the proof in this case consisted of these acts and statements, and the trial court admitted such evidence on the theory that it was proper under the allegations of the indictment charging a continuing conspiracy to conceal the main conspiracy. But the admission of such acts and declarations in furtherance of a claimed subsidiary conspiracy to conceal was emphatically rejected by this Court in *Krulewitch* v. *United States*, 336 U. S. 440, 443-44 (1949). The fact that the conspiracy to conceal was not charged in the *Krulewitch* case but is charged here is a distinction without a difference.

The Court of Appeals, in upholding the admissibility of such evidence, held that it was properly admitted to show the intent of the conspirators. But, plainly, acts and declarations of one conspirator after the termination of the conspiracy, and therefore not in furtherance of it, can only show the intent of the person making them. They cannot possibly show the intent of others.

The decision of the Court of Appeals adds to the substantial perils inherent in the use of conspiracy indictments and widens the already broad conspiracy dragnet.

II.

In federal criminal cases the competency and privileges of witnesses are governed by the principles of the common law as interpreted in the light of reason and experience. In *Funk* v. *United States*, 290 U. S. 371 (1933), this Court held that the wife of a defendant in a federal criminal case was competent to testify on his behalf; the Court's opinion stated, however, that the wife's competency to testify against her husband was not involved.

Since the *Funk* case, Courts of Appeals for four circuits, in addition to the court below in this case, have passed upon the question of the wife's competency to testify against the husband in a criminal case. Three of them have ruled the wife incompetent, the most recent decision being *United States* v. *Walker*, 176 F. 2d 564 (C. A. 2d, 1949), cert. den. 338 U. S. 891 (1949).

Experience in the states shows that there has been no general acceptance of a rule abolishing the privilege and no trend in that direction. Only one state has adopted legislation abolishing the privilege since the *Funk* decision. In fact, the great majority of the states require the consent of either the defendant spouse or the witness spouse before the latter is permitted to testify against the former.

Interpretation of the common law in the light of reason likewise indicates that the privilege to prevent the testimony of a spouse should not be abolished. For, if the privilege were to be done away with, police and prosecuting officials might well make a general practice of interrogating husbands and wives and compelling them to in-

criminate one another. The contention that there has been a trend toward the loosening of marriage ties which would justify abolishing the privilege is not sound, for although the family as an economic unit has declined in importance, the significance of the husband and wife as an emotional, social, and cultural unit has increased.

III.

According to this Court's holding in *Miles* v. *United States*, 103 U. S. 304 (1881), a wife in a plural or fraudulent or otherwise invalid marriage can testify only when its character as such is established. But even when that character is shown by other evidence, the wife of such a marriage cannot testify with respect to the facts tending to show its character. For so long as the facts having to do with the claimed invalidity of the marriage are in dispute, the supposed wife, if permitted to testify as to facts tending to show it, is in effect testifying with regard to her own competency.

These principles of the *Miles* case were not followed in this case, for the trial court refused *voir dire* examinations to determine the competency of Bessie Osborne and Grace Klemtner out of the presence of the jury. The court's view was that the validity of the marriages would be determined by the jury. But in allowing the wives to testify with regard to the circumstances of the marriages, the court permitted evidence to go to the jury with respect to the very issues which had to be determined in order to establish the wives' competency as witnesses. The Court of Appeals found nothing improper in this, despite the plain holding of *Miles* v. *United States*.

IV.

In this case the jury, under the instructions given by the trial court, was called upon to determine the validity of three marriages performed in Paris, France. Nonetheless, despite the clear principle that the validity of a marriage depends upon the law of the place where contracted, no evidence of French law was introduced by the government. By failing to prove the marriage law of France, the government failed to prove an essential element of the offense charged.

The trial court said that it would assume that the law of Paris, France is the same as that of Chicago, Illinois. The Court of Appeals ruled that in the absence of proof to the contrary the marriage laws of another country would be presumed to be the same as those of the forum, and that if the marriage laws of France were different from those of Illinois and the United States, the burden was upon the defendants to prove the differences and thus rebut the presumption that they were the same.

There is no general presumption that the law of France and that of the forum are similar, since the law of France is not based upon the common law. *Cuba R. Co.* v. *Crosby*, 222 U. S. 475, 479 (1912).

Furthermore, under the law of Illinois and most other states, a marriage entered into for the purpose of accomplishing some specific objective is valid, as contrasted to what is termed a marriage in jest. *DeVries* v. *DeVries*, 195 Ill. App. 4 (1915).

Once a marriage is shown, the law raises a strong presumption in favor of its validity. The government endeavored to overcome this presumption by relying upon another, *i. e.*, the presumption as to the similarity of French law. But where presumptions conflict, the presumption in favor of innocence is to be applied.

V.

Where two marriages are shown the second is presumed to be valid, and the party attacking the second marriage must show that the first marriage has not been dissolved. *In re Estate of Dedmore*, 257 Ill. App. 519, 522 (1930). Nonetheless, the government obtained an instruction which advised the jury that "The marriage of a man and woman where one of the parties thereto has a husband or wife by a prior marriage who is then living and undivorced is void." Defense counsel objected to this instruction on the ground that it failed to inform the jury of the presumption in favor of the second marriage; they also pointed out that there was insufficient evidence in the record to justify the instruction.

This instruction was intended to refer to the marriage of Munio and Maria and to their subsequent marriages to Bessie Osborne and Marcel Lutwak respectively. The court thus advised the jury that if they found that the Munio Knoll-Maria marriage had not been dissolved by divorce, then they were bound to conclude that the Munio-Bessie Osborne and the Marcel Lutwak-Maria marriages were void by reason of Munio's and Maria's lack of capacity.

The Court of Appeals conceded that there was insufficient evidence in the record to determine what the Munio-Maria marital status was, for it said that whether there had been a legal divorce was not determinable from the record. Under the presumption in favor of the second marriage the burden was on the government to prove that the first marriage, *i. e.*, that of Munio and Maria, had not been dissolved. This the government failed to do.

ARGUMENT.

I.

Acts and Declarations of a Conspirator Are Not Admissible Against Absent Co-Conspirators When Not in Furtherance of the Conspiracy and After Its Termination. This Is True Even Where a Continuing Conspiracy to Conceal and Avoid Detection and Prosecution Is Expressly Charged, Especially Where No Proof Is Adduced as to Such an Agreement or Acts in Furtherance of It.

A.

Under the doctrine of Krulewitch v. United States, 336 U. S. 440 (1949), such acts and declarations are inadmissible.

The count of the indictment under which petitioners were found guilty charged, in substance, that they conspired (1) to make false and misleading representations and to conceal material facts in order to secure the entry into the United States of Munio Knoll and Leopold Knoll on November 13, 1947, and December 5, 1947, respectively; (2) to make false statements under oath on September 9, 1947, November 13, 1947, and December 5, 1947, in applications required by the Immigration Laws for the admission into the United States of Maria Lutwak, Munio Knoll and Leopold Knoll, respectively; and (3) to defraud the United States of its governmental functions of administering the Immigration Laws and the Immigration and Naturalization Service free from fraud, deceit, and misrepresentation.

The evidence conclusively demonstrated that the last of the allegedly fraudulent entries into the United States

occurred on December 5, 1947. By that time all misrepresentations, concealments, and false statements, if any, in furtherance of such entries had occurred. Accordingly, the conspiracy terminated on that date since its objective had been successfully attained. *Krulewitch* v. *United States*, 336 U. S. 440, 442 (1949); *Fiswick* v. *United States*, 329 U. S. 211, 216 (1946); *Brown* v. *United States*, 150 U. S. 93, 98 (1893); *United States* v. *Rubenstein*, 151 F. 2d 915, 917 (C. A. 2d, 1945).

Therefore, statements and acts of the conspirators after the last entry were not admissible against other defendants, not present, since not in furtherance of the conspiracy and not within the exception to the hearsay rule. *Fiswick* v. *United States*, 329 U. S. 211, 215, 216, 217 (1946); *Krulewitch* v. *United States*, 336 U. S. 440, 442, 443 (1949); *Logan* v. *United States*, 144 U. S. 263 (1892).

Nevertheless, a major portion of the proof in this case consisted of such acts and statements. In fact, only four of the government's eighteen witnesses testified to significant events occurring prior to the entries, and a large portion of their testimony concerned happenings occurring long after the conspiracy ended. The complained of testimony consisted largely of evidence to the effect that the parties to each marriage lived apart from each other (R. 65-66, 69, 135-137, 210, 250, 260); that the husband in one marriage lived and slept with the wife (his former wife) in another marriage (R. 69, 104, 105, 141, 143, 177), and took her to night clubs where they had pictures taken of themselves and others (Govt. Exs. 22, 23, 24, 25; R. 16, 61, 168, 169, 176, 178, 181-184, 280, 287).

The trial court admitted this evidence, over objection, against all petitioners (R. 67, 68, 140, 142) on the theory that it was proper to do so under allegations of the conspiracy count of the indictment that it was a further part

of the conspiracy that the "said defendants would at all times *subsequent to the formation of the said conspiracy conceal such transactions and acts aforesaid* and *would do such other, further and different acts* as they might deem necessary and expedient *to prevent the disclosure* to the United States Immigration and Naturalization Service of the existence of said conspiracy" (R. 7, 67, 68). (Emphasis added.)

The admission of acts and statements of a conspirator against absent co-conspirators in furtherance of a subsidiary conspiracy to conceal and avoid detection and prosecution was emphatically rejected by this Court in *Krulewitch v. United States*, 366 U. S. 440 (1949). In disposing of this question, this Court there said at pages 443-44:

> This prerequisite to admissibility, that hearsay statements by some conspirators to be admissible against others must be made in furtherance of the conspiracy charged, has been scrupulously observed by federal courts. The Government now asks us to expand this narrow exception to the hearsay rule and hold admissible a declaration, not made in furtherance of the alleged criminal transportation conspiracy charged, *but made in furtherance of an alleged implied but uncharged conspiracy aimed at preventing detection and punishment.* No federal court case cited by the Government suggests so hospitable a reception to the use of hearsay evidence to convict in conspiracy cases. The Government contention does find support in some but not all of the state court opinions cited in the Government brief. But in none of them does there appear to be recognition of any such broad exception to the hearsay rule as that here urged. The rule contended for by the Government could have far-reaching results. *For under this rule plausible arguments could generally be made in conspiracy cases that most out-of-court statements offered in evidence tended to shield co-conspirators.* We are not persuaded to adopt the Government's implicit conspiracy theory which in all

> criminal conspiracy cases would create automatically a further breach of the general rule against the admission of hearsay evidence. (Emphasis added.)

It is, of course, quite plain that this Court was there speaking of an "implied but uncharged" conspiracy, whereas the conspiracy to conceal in the case at bar was expressly pleaded as a further part of the conspiracy already charged. We respectfully submit, however, that the setting forth in the indictment here of what the government attempted to imply in the *Krulewitch* case makes for a distinction without a difference.

This becomes very clear in the light of the reasoning in the opinion in *Krulewitch* case. The evils of such a conspiracy, in addition to those already described, are: (1) there is no logical limit to such a conspiracy, either as to duration or means, (2) such a conspiracy, if it need not be proven, cannot be overcome by express or credible evidence and an accused would be unable to terminate the imputed agency of his associates to incriminate him, (3) an indefinitely continuing offense would result in an indeterminate extension of the Statute of Limitations, and (4) the recognition of such a conspiracy by the courts would create a new judge-made offense of doubtful constitutionality, even if it were created by Congress. Each of these evils results from creating a conspiracy to conceal, regardless of whether the conspiracy is charged or implied.

In the case at bar, the government made no effort to prove the conspiracy to conceal as charged, and produced no evidence indicating that such a conspiracy was carried out. In fact, the evidence demonstrated that petitioners talked to any and every one about the transactions they were allegedly covering up (*e. g.*, R. 152, 153, 160). Further, no overt act in furtherance of such a conspiracy was set forth in the indictment.

In the *Krulewitch* case, this Court was concerned with the admission of a statement by which one of the defendants there actually attempted a concealment. As has been seen, this Court found such a statement inadmissible. Here, acts and statements which in no way could be construed as preventing a disclosure were admitted on the theory that they were in furtherance of a conspiracy to prevent such disclosure. *A fortiori* they are all inadmissible for all of the reasons set forth in the *Krulewitch* case.

In addition, and compounding the error, is the fact that the court admitted in evidence an admission against interest made by one of the petitioners prior to the last entry to the effect that "it is easy to come to the United States if you know how" (R. 160). This statement was admitted against all (R. 160) on the theory that it was in furtherance of the general conspiracy, the trial court stating that "an admission may be admissible against all parties to the conspiracy" (R. 159). Such an admission is not in furtherance of the conspiracy, and it is immaterial whether or not the conspiracy was still in existence or had been consummated or terminated. Such evidence is admissible only against the person making the statement. *United States* v. *Guido*, 161 F. 2d 492, 495 (C. A. 3d, 1947).

B.

Post conspiracy acts and declarations are not admissible on the question of the intent of absent co-conspirators.

The inadmissibility of these post-conspiracy acts and declarations under the *Krulewitch* case was briefed and argued by petitioners in the court below.

That court, without referring to the *Krulewitch* doctrine at all, shifted the reasons supporting the admission of such evidence and ruled that acts and declarations after

entry were admissible on the question of petitioners' intent to have performed valid marriages. In so ruling, the Court of Appeals stated (R. 399):

> Complaint is made that the court permitted evidence of events in America subsequent to the entries. When we remember that this case turned almost entirely upon the question of the validity of the Parisian marriages and that whether they were valid, in turn, depended upon the intent of the parties at the time the ceremonies occurred, it is clear that not only what was said and done prior to the time of the marriages, but that the conduct of the parties and their statements after they returned to America were relevant and competent for the jury to consider in determining whether in fact they reflected an intent to have performed valid marriages or whether they tended to show that the intent was merely to pretend to be married.

It is conceded, of course, that the acts and declarations of a conspirator after the termination of a conspiracy are admissible against *him* to show *his* intent, but here the court below failed to perceive that the trial court had admitted this testimony against *all* the alleged conspirators, including those absent. The court below has thus broadened the law of admissibility in conspiracy cases by permitting post-conspiracy acts and declarations of a conspirator to be used against conspirators not present on the question of *their* intent.

Since acts and declarations after the termination of a conspiracy are not in furtherance of it, the decision of the court below, carried to its logical limits, opens up an avenue whereby even the confession and other admissions against interest of one conspirator would be admissible against others as bearing on their intent. The dangers inherent in the conspiracy charge have been effectively pointed out by this Court and other courts. *United States* v. *Krulewitch*,

366 U. S. 440 (1949); *United States* v. *Falcone*, 109 F. 2d 579, 581 (C. A. 2d 1940). The decision below adds to these perils and tears down and destroys historic barriers painstakingly erected by this Court against those who would widen the already broad conspiracy dragnet. *Fiswick* v. *United States*, 329 U. S. 211, 216, 217 (1946); *Logan* v. *United States*, 144 U. S. 263, 309 (1892); *Brown* v. *United States*, 150 U. S. 93, 98 (1893).

II.

Reason and Experience Both Require the Rule That in Federal Criminal Cases One Spouse Cannot Testify Against the Other Unless the Defendant Spouse Waives the Privilege.

In federal criminal cases the competency and privileges of witnesses are governed by the principles of the common law as interpreted by the courts of the United States in the light of reason and experience. This is the guide laid down by Rule 26 of the Federal Rules of Criminal Procedure.

At the trial, Maria, who had once been married to Munio Knoll and later to Marcel Lutwak, Bessie Osborne, who had gone through a marriage ceremony with Munio Knoll, and Grace Klemtner Knoll, who had gone through a marriage ceremony with Leopold Knoll, all testified over objection (R. 41-42, 56-57, 187, 225). The Court of Appeals, in its supplemental opinion, found a "modern trend of thought in this country" which justified the holding that "irrespective of all other questions, the wives were competent witnesses" (R. 412-13). It should be noted, however, that virtually all the cases cited by the court deal with crimes against the wife.

At common law a spouse was incompetent to testify either for or against the other spouse, except in cases involving a crime against the wife. This court, in *Funk* v. *United States,* 290 U. S. 371 (1933), determined that in a federal criminal case the wife of a defendant was competent to testify on his behalf. The opinion of this Court, however, pointed out that the competency of the wife to testify against her husband was not involved. 290 U. S. 371, 373 (1933).

Since the *Funk* case, experience with the latter question in the federal courts has resulted in decisions in three circuits holding that a spouse is incompetent. *Paul* v. *United States,* 79 F. 2d 561 (C. A. 3rd, 1935); *Brunner* v. *United States,* 168 F. 2d 281 (C. A. 6th, 1948); *United States* v. *Walker,* 176 F. 2d 564 (C. A. 2d, 1949), cert. den. 338 U. S. 891 (1949). One circuit has decided that the rule as to the spouse's incompetency is obsolete, *Yoder* v. *United States,* 80 F. 2d 665 (C. A. 10th, 1935), but as Judge Learned Hand observed in the *Walker* case, at page 568, that part of the *Yoder* opinion is dictum.

In the most recent of these Court of Appeals decisions, *United States* v. *Walker,* 176 F. 2d 564, 568 (C. A. 2d, 1949), the court wrote:

> We conclude therefore that we should await the choice of Congress between the conflicting interests involved, or such an overwhelming general acceptance by the states of the abolition of the privilege, as induced the Supreme Court to action in Funk v. United States.

And as late as 1949, this Court in *Griffin* v. *United States,* 336 U. S. 705, 714 (1949) stated:

> The Federal courts have held that one spouse cannot testify against the other unless the defendant spouse waives the privilege.

Moreover, experience in the state courts and legislatures, far from showing "an overwhelming general acceptance by the states of abolition of the privilege", indicates that only one state has abolished the privilege since the *Funk* case.

At this point a word about terminology is in order. The incompetency of one spouse to testify *for* the other spouse has been almost universally abolished. But what this Court in the *Funk* case called the competency of the wife to testify *against* her husband has been treated in different ways in different states. Thus some state statutes read in terms of whether the wife's testimony is *compellable*, while some say she may not testify without the *consent* of her husband. In other states, statutes speak in terms of a privilege—a privilege which Wigmore calls a "privilege for anti-marital facts". Wigmore, *Evidence*, 3rd Ed. § 2227. It is clear that a statute conferring the privilege not to testify against one's wife or husband on both the witness spouse and the defendant spouse achieves the same result as a statute declaring that one spouse is incompetent to testify against the other. This privilege, of course, is to be distinguished from the privilege against the disclosure of confidential communications between husband and wife.

Experience in the States.

In each of the forty-eight states, there are statutes dealing with the competency and privileges of spouses. An attempt has been made, therefore, to classify those statutes in order to demonstrate that experience with this question in the states does not justify the abolition of the common law rule.

In the following twelve states the statutes read in terms of competency. Each of these statutes provides that one

spouse is not competent to testify against the other spouse in a criminal case.[1]

Arkansas—(Ark. Stat. Ann., 1947, § 43-2019).
Georgia—(Code of Ga. Ann., Title 38-1604).
Iowa—(Ia. Code Ann., §§ 622.7).
Nebraska—(Revised Stat. of Neb., 1943, § 25-1203).
New Jersey—(N. J. Stat. Ann., 1937, §§ 2:97-4, 2:97-9).
New Mexico—(N.M. Stat. Ann., 1941, § 42-1220).
North Carolina—(Gen. Stat. of N. C., 1943, Ch. 8, Art. 7, § 8-57).
Ohio—(Pages Ohio Gen. Code Ann., § 13444-2).
Oklahoma—(Oklahoma Stat. Ann., Title 22, par. 702).
Pennsylvania—(Purdon Pa. Stat. Ann., Title 19, § 683).
Texas—(Vernon's Tex. Stat., Code of Crim. Procedure, par. 714).
Wyoming—(Wyo. Compiled Stat., 1945, Ann., 3-2605).

In eight states the statutes read in terms of consent. In these states the statutes provide that one spouse may not testify against the other in a criminal case unless *both spouses* consent.

California—(Deering's Calif. Penal Code, § 1322).
Idaho—(Idaho Code, 1948, Title 19-3002).
Mississippi—(Miss. Code Ann., 1942, par. 1689).
Montana—(Revised Code of Mont., 1947, Ann. § 94-8802).
Oregon—(Oregon Compiled Laws Ann., 1940, § 26-935).
Utah—(Utah Code Ann., 1943, §§ 105-1-10, 105-45-4).
Virginia—(Code of Va., 1950, §§ 8-287, 8-288).
West Virginia—(W. Va. Code of 1949 Ann., §§ 5727, 5728).

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1. The latest available supplements to the statutes cited on pp. 34-36 have been checked. No amendments or changes have been found which modify any of the provisions referred to.

In nine states the statutes provide that a spouse may not testify against the other spouse without the consent of the *defendant spouse*. This rule is the same as that stated for the federal courts in *Griffin* v. *United States*, 336 U. S. 705, 714, 715 (1949).

Arizona—(Ariz. Code Ann., 1939, §§ 23-103, 44-2701).
Colorado—(1935 Colo. Stat. Ann., Ch. 177, par. 9).
Michigan—(Mich. Stat. Ann., § 27.916).
Minnesota—(Minn. Stat. Ann., § 595.02).
Missouri—(Mo. Revised Stat. Ann., § 4081).
Nevada—(Nev. Compiled Laws, 1929, par. 8971).
North Dakota—(N. D. Revised Code of 1943, § 31-0102).
South Dakota—(S. D. Code of 1939, § 36.0101).
Washington—(Remington's Revised Stat. of Wash. Ann., § 1214).

In seven states the statutes require the consent of the *witness spouse*. They provide that a spouse may not be *compelled* to testify against the other spouse.

Alabama—(Code of Ala. 1940, Title 15, § 311).
Connecticut—(General Stat. of Conn., Revision of 1949, Vol. 3, § 8800).
Kansas—(General Stat. of Kans. Ann., 1949, Ch. 62, Art. 142).
Kentucky—(Carrolls Ky. Code, par. 606).
Louisiana—(La. Rev. Stat. Code of Crim. Procedure, § 15:461).
Massachusetts—(Ann. Laws of Mass., 1933, Ch. 233, § 20).
Rhode Island—(General Laws of R. I., 1938, Ch. 537, § 17).

The remaining states have abolished the incompetency of the spouse and have retained by statute or by state

court decision only the privilege against disclosure of confidential communications between husband and wife.

Delaware—(Revised Code, Del., 1935, § 4691).
Florida—(Florida Stat. Ann., 1944, §§ 90.04, 932.31).
Illinois—(Ill. Revised Stat., 1951, Ch. 38, § 734).
Indiana—(Burns Indiana Stat. Ann., § 9-1603).
Maine—(Revised Stat. of Maine, 1944, § 22, page 1928).
Maryland—(Ann. Code of Maryland, 1951, Art. 35, § 4).
New Hampshire—(Revised Laws of N. H., 1942, § 29, page 1664).
New York—(McKinneys Consol. Laws of New York Ann., Penal Law § 2445).
South Carolina—(Code of Laws of S. C., 1942, par. 692(1)).
Tennessee—(Williams Tennessee Code Ann., 1934, § 9778).
Vermont—(Vermont Stat., 1947, Ch. 84, § 1738).
Wisconsin—(Wisconsin Stat., 1951, § 325.18).

In some of these states, however, this privilege includes, in addition to communications, facts learned by reason of the marriage relationship. Thus in New Hampshire and Vermont the statutes provide that the husband and wife are competent to testify for or against each other, except for communications or facts which would lead to a violation of marital confidence. In Florida, Indiana, New York, and Tennessee, the courts have interpreted the privilege to include facts observed by the spouse as a result of the marriage relationship. *Mercer* v. *State*, 40 Fla. 216 (1898); *Beyerline* v. *State*, 147 Ind. 125 (1897); *People* v. *Daghita*, 299 N. Y. 194 (1949); *McCormick* v. *State*, 186 S. W. 95 (Tenn. 1916).

Thus only in Delaware, Illinois, Maine, Maryland, South Carolina, and Wisconsin are both spouses permitted to

testify for or against each other, except for confidential communications.

The experience in the several states with respect to the testimony of one spouse against the other in a criminal case not involving a crime against the witness spouse may thus be summarized as follows:

1. Communications between husband and wife during coverture are privileged in virtually every state.

2. In at least forty-two states the consent of one spouse or the other is required before one may testify against the other with respect to facts learned as a result of the marital relation.

3. In at least thirty-six states the consent of one spouse or the other is required by statute before one may testify against the other at all.

4. In at least twenty-nine states the consent of the defendant spouse is required by statute before the other spouse may testify at all.

Moreover, of the six states which seem to have abolished the incompetency and privileges of spouses, except with respect to confidential communications, in only one, Illinois, has the statute been passed since the *Funk* case. In fact, in the group of ten states which have abolished the incompetency and privileges of spouses in criminal cases by statute, the last statute to be enacted, with the exception of Illinois, was passed in 1917. Most of these statutes were enacted prior to 1910. And in the seven states which confer the privilege on the witness spouse, not one of the statutes is subsequent to 1930.

Thus it appears not only that the majority of the statutes reflect the common law rule, but also that there has been no trend in modern times, and certainly no trend since the *Funk* case, which might conceivably lead to the conclusion that experience warrants changing the federal rule.

If experience were the sole criterion, therefore, there would be no justification for interpreting the common law other than as it has always been interpreted in federal criminal cases.

The decision in *Michelson* v. *United States,* 335 U. S. 469, 486 (1938), is applicable here. Although this Court regarded the rule there under consideration as "archaic, paradoxical and full of compromises and compensations by which an irrational advantage to one side is offset by a poorly reasoned counter privilege to the other", it decided against changing the established rule. This Court said at page 487:

> The confusion and error it would engender would seem too heavy a price to pay for an almost imperceptible logical improvement, if any, in a system which is justified, if at all, by accumulated judicial experience rather than abstract logic.

In the Light of Reason.

Interpretation of the common law in the light of reason requires the same conclusion with respect to the competency of spouses to testify against each other in criminal cases.

At work in the laboratories of the states are two social forces in conflict: the interest of the states in obtaining facts in criminal proceedings, and the special protection society affords to the marriage relationship. In every state, recognition is given to the close emotional ties between husband and wife and the need for mutual trust and confidence in that relationship, by protecting confidential communications between husband and wife from compulsory disclosure. This Court has afforded spouses that same protection in *United States* v. *Blau,* 340 U. S. 332, 333 (1951).

But the question in this case is whether, despite the experience of the states, reason requires the abolition of the privilege against the compulsory disclosure by one spouse of *facts* which may incriminate the other.

That the privilege against the compulsory disclosure of confidential communications and the privilege against the compulsory disclosure of incriminating facts rests upon the same foundations is clear. It is no less a betrayal of the husband for the wife to testify as to something *he told her* which may send him to jail, as it is for her to testify as to something *he did* which has the same result. This is well illustrated in *People* v. *Daghita*, 299 N. Y. 194 (1949), where the New York Court of Appeals held that confidential communication between husband and wife "includes knowledge derived from the observance of disclosive acts in the presence or view of one spouse by the other." The court held that a wife might not testify that she saw her husband bringing into the house articles identified by other witnesses as stolen property.

Should the privilege that now exists in the federal courts be abolished, the practice of questioning the spouses of suspects and of calling them before grand juries would become commonplace. This Court, having found it necessary to create safeguards against the use of coerced confessions, should recognize that the abolition of the spouse's privilege here may well encourage law enforcement officers to interrogate husbands and wives about each other in derogation of deep-rooted human instincts and sensibilities.

It is submitted, moreover, that it is insufficient to confer the privilege only upon the witness spouse. The practice of inducing accomplices to testify by offering immunity or light sentences is well known. On the record here, Grace Knoll, who was called as a court's witness because the gov-

ernment would not vouch for her credibility, had been indicted along with petitioners. Bessie Osborne and Maria Knoll were never indicted. Where the prosecution is able to place the wife in a position from which she may escape indictment only by testifying against her husband, the husband ought to be given the privilege of barring her from the witness stand lest the marriage relationship crack under the strain of the decision she must make if the privilege is hers.

In this case, the defendant spouses objected to the testimony of the wives. In addition, the record indicates that Maria and Grace were unwilling witnesses who testified only because compelled to do so. Thus Maria, immediately upon being called to the stand, unsuccessfully attempted to talk to the judge (R. 40). Grace, having been subpoenaed in California for the trial, was put on the stand as a court's witness. She stated that she believed she needed counsel, and declined to answer several questions for fear of possible self-incrimination (224-26, 240-42, 247, 264). Moreover, Grace had originally been indicted as a co-conspirator (R. 4-9); she was dismissed from the indictment because her constitutional rights had been infringed (R. 18, 224-25). Hence, regardless of whether this Court adopts a rule granting the privilege to the witness spouse or whether it retains the rule as it now exists, with the privilege in the defendant spouse, the decision below should be reversed.

A further point deserves this Court's consideration. What was once thought to constitute a trend toward the loosening of marriage ties, a trend arising in part from the emancipation of women, is no longer so considered by students of the family. The fact is that the family is no less important today than it was in 16th Century England. Admittedly, the family does not now perform the same economic functions it did three centuries ago. But with

the disappearance of the large family as an economic unit, the husband and wife have grown closer together as an emotional, social, and cultural unit. In totalitarian countries the claims of the state may be elevated to first position, but in the Western world at least the family unit has retained primacy.

III.

Where the Competency of a Witness Who is Prima Facie Incompetent Can Only Be Shown by Proof of a Contested Fact, It Is Error to Permit That Witness to Testify With Respect to the Very Issue Which Must Be Proved to Establish the Witness' Competency.

This is the rule announced in *Miles* v. *United States*, 103 U. S. 304 (1881), a case involving a prosecution for polygamy in the Territory of Utah. It was recently acknowledged to be the law in a decision of the Court of Appeals for the District of Columbia. *Matz* v. *United States*, 158 F. 2d 190 (App. D. C. 1946).

According to *Miles* v. *United States*, a wife in a plural or fraudulent or otherwise invalid marriage can testify only when its character as such is established. But the wife in such a marriage, even when its character is established, cannot testify with respect to the facts tending to show that character. For, clearly, so long as the facts having to do with the invalid character of the marriage are in dispute, the supposed wife, if she is permitted to testify concerning it, is in effect testifying with regard to her own competency.

As this Court said in the *Miles* case, 103 U. S. 304, 313-14:

> The ground upon which a second wife is admitted as a witness against her husband, in a prosecution for bigamy, is that she is shown not to be a real wife by

proof of the fact that the accused had previously married another wife, who was still living and still his lawful wife. It is only in cases where the first marriage is not controverted, or has been duly established by other evidence, that the second wife is allowed to testify, and she can then be a witness to the second marriage, and not to the first.

The testimony of the second wife to prove the only controverted issue in the case, namely, the first marriage, cannot be given to the jury on the pretext that its purpose is to establish her competency. As her competency depends on proof of the first marriage, and that is the issue upon which the case turns, that issue must be established by other witnesses before the second wife is competent for any purpose. Even then she is not competent to prove the first marriage, for she cannot be admitted to prove a fact to the jury which must be established before she can testify at all.

Witnesses who are *prima facie* competent, but whose competency is disputed, are allowed to give evidence on their *voir dire* to the court upon some collateral issue, on which their competency depends, but the testimony of a witness who is *prima facie* incompetent cannot be given to the jury upon the very issue in the case, in order to establish his competency, and at the same time prove the issue.

The application of these principles to the case here is readily apparent. At the trial defense counsel asked for *voir dire* examinations in order that the competency of Bessie Osborne and Grace Klemtner could be determined out of the presence of the jury (R. 187-89, 225-26). The court refused, stating that it would allow the validity of the marriages to be determined by the jury (R. 41, 49, 56-57, 187-88, 224-26). In thereupon permitting the wives to testify with regard to the circumstances of the marriages, the court allowed evidence to go to the jury with respect to the very issues which had to be decided in

order to establish the wives' competency. Under the *Miles* case this was clearly error.

The Court of Appeals originally took the position that since the validity of the marriages was contested and was therefore a question of fact for the jury, and since the jury, by its verdicts of guilty, resolved that question by finding the marriages invalid, there were in fact no marriages and hence the rule as to the incompetency of wives did not arise (R. 397). In its supplemental opinion the Court of Appeals said that the trial court was justified in allowing the wives to testify in view of the *prima facie* showings of invalidity and thus to leave to the jury "the final determination of fact" (R. 413). But neither view can be squared with the *Miles* decision holding it to be error to permit the second wife to testify against the defendant as to *all* issues, including the issue of the prior undissolved marriage.

In this case, Bessie Osborne's testimony, a major portion of which related to the circumstances of her marriage to Munio Knoll (R. 190-210), upon which the government was relying to show the invalidity of that marriage, was clearly improper, since what Bessie had to say bore both upon the ultimate issues to be decided by the jury and also upon the issue determinative of her own competency. What is more, taking the Court of Appeals' initial formulation, the verdict of not guilty returned by the jury as to Leopold Knoll had the effect of upholding the validity of the Leopold-Grace marriage and necessarily, then, of rendering Grace incompetent. Much of Grace's testimony was plainly prejudicial to petitioners Treitler and Lutwak (R. 228-38, 242, 247).

IV.

The Validity of Marriages Performed in France is to Be Determined by French Law, and There is no Presumption That French Law is the Same as That of the Forum. By Failing to Prove the Law of France, the Government Failed to Prove an Essential Element of the Offense Charged. Further, if There be Such a Presumption, it Conflicts With and Yields to a Presumption in Favor of the Validity of Marriages Shown to Have Been Performed.

A.

The government had the burden of establishing the invalidity of the Parisian marriages. That burden could not be shifted by reliance on a non-existent presumption that French law and the law of the forum are the same.

The Court of Appeals recognized that "the contest in the trial court centered largely about these two factual questions, viz., did defendants conspire, and if so, did the government prove by competent evidence that the marriages were in fact invalid" (R. 392).

With respect to the latter question, no evidence was ever presented by the government that the marriages were invalid under French law. Instead the court below held that these marriages under the evidence presented were sham and void under the law of this country, because they had been entered into only for the sake of representing them as such to the outside world and with the understanding that they would terminate as soon as they had served their purpose (R. 396). The Court of Appeals ruled that it was not necessary for the government to prove the French law since "in the absence of proof to the contrary, the marriage laws of another state or country are pre-

sumed to be the same as the law obtaining in the forum, there is no presumption that the marriage laws of another state are different from the laws obtaining in the forum" (R. 414) and further that "if the French law differs from that of Illinois and the United States, it was defendants' duty to show that fact and thus rebut the presumption that it was the same"[1] (R. 414).

The burden of proving each essential element of the offense beyond all reasonable doubt was upon the government, and that burden in a criminal case never shifts. *Lilienthal's Tobacco* v. *United States*, 97 U. S. 237 (1878); *Ezzard* v. *United States*, 7 F. 2d 808, 811 (C. A. 8th, 1925). Where problems comparable to those in this case have arisen in state criminal cases the prosecution has been required to sustain the burden of proving the foreign law invalid. *Commonwealth* v. *Stevens*, 196 Mass. 280 (1907); *State* v. *Henneman*, 40 N. M. 166 (1936). In addition, since marriages shown to have been celebrated as here (R. 60-62, 191-92, 245-46) are presumed to be valid, the burden is always on the party asserting invalidity to prove it. *Gaines* v. *City of New Orleans*, 73 U. S. 642 (1868); *Marris* v. *Sockey*, 170 F. 2d 599, 603 (C. A. 10th, 1948); *Mathews* v. *Jones*, 149 F. 2d 893, 894 (C. A. 5th, 1945). In so doing he must do so by full proof, which proof should be irrefragable. *Gaines* v. *Hennen*, 65 U. S. 553 (1861).

Under familiar principles of Conflict of Laws, such in-

1. The authorities cited by the court below in support of its ruling are singularly inapposite. Not one of them is a federal criminal case. Not one of them is a criminal case involving the law of a foreign country. Not one of them presumes that the marriage law of a foreign country is the same as that of the forum in the absence of proof by the party having the burden of proving what the foreign law is. Not one of them presumes that the marriage law of a foreign country is the same as that of the forum where such a presumption has the effect of invalidating a marriage, and not one of them involves the marriage law of a civil country.

validity is to be determined by the law of the place where the marriages were contracted. *Franzen* v. *E. I. Du Pont de Nemours & Co.*, 146 F. 2d 837, 839 (C. A. 3d, 1944); *Toshiko Inaba* v. *Nagle*, 36 F. 2d 481 (C. A. 9th, 1929). In this case, since the marriages took place in Paris, France, their validity should have been determined by French law. That law, not being subject to judicial notice, thus became a fact to be proven like any other fact. *Black Diamond S. S. Corp.* v. *Robert Stewart & Sons*, 336 U. S. 386, 396, 397 (1949). Petitioners so contended in the trial court (R. 189). That court, however, took the position that this was not necessary since it would assume, with respect to the question involved, that the law of "Paris, France, is the same as the law of Chicago, Illinois" (R. 189). This assumption was later dignified by the court below into the presumption by virtue of which that court relieved the government of its obligation to prove French law (R. 414).

There is, however, no such presumption as would here permit an inference that the law of France and of the forum are similar. This Court in the past has taken judicial notice (presumably on grounds of general knowledge) of the nature and bases of judicial systems of foreign countries, and where those systems are not based on the common law, this Court has held that there is no general presumption that that law is the same as the common or statute law of the forum. *Cuba R. Co.* v. *Crosby*, 222 U. S. 473, 479 (1912). This rule has been followed by the lower courts. *United States ex rel. Jelick* v. *District Director of Immigration*, 106 F. 2d 14, 20, 21 (C. A. 2d, 1939); *Bonsalem* v. *Byron S. S. Co.*, 50 F. 2d 114, 115 (C. A. 2d, 1931); *Ozanic* v. *United States*, 165 F. 2d 738, 744 (C. A. 2d, 1948). As is generally known, the law of France is founded on the Roman law and the Code Napoleon and not the common law. Hence, under the above rule, there is no presumption that the French law is the same as the

law of the forum. *Commissioner* v. *Hyde*, 82 F. 2d 174, 176 (C. A. 2d, 1936); *Barrielle* v. *Beltman*, 199 Fed. 838, 840 (C. A. 10th, 1912). The government has therefore failed to prove one of the essential issues in the case, *i. e.*, the invalidity of the Parisian marriages.

B.

Even if, arguendo, there be such a presumption, the marriages were not void under the law of the forum.

The evidence, taken at its strongest for the government, indicated that the parties to the various marriages entered into them freely with a view to accomplishing the entry into the United States of the alien spouse in each marriage. Thereafter, they were to be terminated. Under the law of Illinois and most other states such marriages are not invalid. The majority rule is that where a man and woman have gone through a marriage ceremony for the purpose of accomplishing a definite object, but pursuant to an understanding that after the marriage has been performed each party would go his own way and one of them would later seek a divorce or an annullment, such a marriage is valid; and most courts have refused to give effect to the intent of the parties that the marriage should be merely a matter of form. *DeVries* v. *DeVries*, 195 Ill. App. 4 (1915); *Schidi* v. *Schidi*, 136 Conn. 196 (1949); *Hanson* v. *Hanson*, 287 Mass. 154 (1934); *Delfino* v. *Delfino*, 35 N. Y. S. 2d 693 (1942); *Erickson* v. *Erickson*, 48 N. Y. S. 2d 588 (1944); *Anonymous* v. *Anonymous*, 49 N. Y. S. 2d (1944); *Campbell* v. *Moore*, 189 S. C. 197 (1939); *Bove* v. *Pinciotti*, 46 Pa. D. & C. 159 (1942); *Wagner* v. *Wagner*, 59 Pa. D. & C. 90 (1947).

The court below apparently decided that the marriages were in jest (R. 396). In so doing it failed to distinguish

between the agreement to marry and the marriage contract itself. *DeVries* v. *DeVries*, 195 Ill. App. 4, 5 (1915). Thus, even though the parties may have decided that they would later terminate their marriages, nevertheless the two things essental to the validity of the marriages existed—capacity and consent.

C.

The presumption of similarity of French law to the law of the forum yields to the presumption that a marriage when shown to have been performed is valid.

Where a marriage has been shown in evidence as here, whether regular or irregular and whatever form the proof, the law raises a strong presumption of its validity. *Gaines* v. *Hennen*, 65 U. S. 553 (1861); *Freeman S. S. Co.* v. *Pillsbury*, 172 F. 2d 321, 323 (C. A. 9th, 1949); *Mathews* v. *Jones*, 149 F. 2d 893, 894 (C. A. 5th, 1945; *Marris* v. *Sockey*, 170 F. 2d 599, 603 (C. A. 10th, 1948); *Flynn* v. *Troesch*, 373 Ill. 275, 293 (1940); *Ertel* v. *Ertel*, 313 Ill. App. 326, 332 (1942).

As has been pointed out, the government attempted to overcome this presumption and the presumption of innocence by relying on another presumption, *i.e.*, the presumption as to the similarity of French law to the law of the forum. Petitioner's presumption was in favor of their innocence and the government's in favor of their guilt. Under such circumstances, the former presumption is preferred and is to be applied. *Dalton* v. *United States*, 154 Fed. 461, 463 (C. A. 10th, 1907); *cf. Crude Oil Corp. of America* v. *C. I. R.*, 161 F. 2d 809, 810 (C. A. 10th, 1947).

To summarize the matter as plainly as possible, the rulings below (1) excused the government from proving what would otherwise be an essential fact, namely, the law of France with respect to the validity of the marriages in-

volved; (2) pronounced the law of France to be the same as that of Illinois; (3) placed upon the defendants the burden of showing any differences between French and Illinois marriage law.

This position was taken in the absence of any showing that it would be difficult or impossible for the government to be required to prove French law, and in fact the Assistant United States Attorney indicated that he had looked into the French law to some extent (R. 189). And most startling of all, the presumption was taken with respect to the laws of a country whose legal system has very little in common with our own. As the cases cited above indicate, the limits, even in civil cases, of permissible presumptions as to foreign law are quite narrow where a civil law country such as France is involved. The limits are even narrower when the question is something other than a routine one. See *E. Geli & Co.* v. *Cunard S. S. Co.* 48 F. 2d 115, 117 (C. A. 2d, 1931).

V.

Where Two Marriages Are Shown, the Second Is Presumed to Be Valid, and the Party Attacking the Second Marriage Must Show That the First Marriage Has Not Been Dissolved. Instruction No. 22, Offered by the Government and Given by the Court, Is Improper Because of Its Failure to Advise the Jury of Such a Presumption. What Is More the Evidence Does Not Support the Giving of the Instruction.

Inasmuch as Munio Knoll and Maria had been married in Poland in 1932 and subsequently went through marriage ceremonies with Bessie Osborne and Marcel Lutwak respectively, the question appeared to be posed as to Munio's and Maria's capacity to remarry. Although the

Assistant United States Attorney declined to indicate whether the government contended that Munio and Maria were never validly divorced and therefore lacked such capacity (R. 42), the government requested and obtained the following instruction: "The marriage of a man and woman where one of the parties thereto has a husband or wife by a prior marriage who is then living and undivorced, is void" (Instruction 22, R. 339, 354). In the Court of Appeals the government claimed that "at no time did the government assert the bigamous marriage theory" (Answer to Pet. for Rehearing, p. 15), although it apparently intends to rely upon it in this Court (Gov't Bf. in Opposition to Pet. for Certiorari, p. 24).

If this instruction was not intended to refer to the marriage of Munio and Maria and to their subsequent marriages to Bessie Osborne and Marcel respectively, it has no application to the case at all. Its plain effect was to instruct the jury that if they found that the Munio Knoll-Maria marriage had not been dissolved by divorce, then they were bound to conclude that the Munio-Bessie Osborne and the Marcel Lutwak-Maria marriages were void by reason of Munio's and Maria's lack of capacity.

At the trial, defense counsel objected to the offered instruction on the ground that first, there was no evidence to support it, particularly in view of the prosecutor's admission in his opening statement that there had been a rabbinical divorce between Munio and Maria, and on the further ground that second, it was contrary to law in that it failed to advise the jury of the presumption in favor of a second marriage. The trial court overruled these objections (R. 304-06). The Court of Appeals, while discussing at one point what it considered to be an insistence by petitioners that the jury should have been charged "that there is a presumption of validity of a marriage"

(R. 398)—something quite different from a presumption in favor of a second marriage where two are shown—did not consider these objections to the instruction as given.

Instead, the court below begged the question, stating that when "validity is denied and attacked by affirmative evidence of invalidity, whether the presumptions have been overcome becomes a question of fact for the jury" (R. 398). But the question raised by petitioners was whether or not Instruction 22 should have been given in the first place without giving recognition to the presumption that a second marriage is valid. The question was not what the jury could do with a presumption of validity once it had been told there was such a presumption, *Here the jury never was told of any such presumption. Hence, it was impossible for it to decide that the presumption had been overcome since it never knew in the first place that the presumption existed.*

With respect to the first contention on this point advanced by petitioners in the trial court, it would seem virtually to have been conceded by the Court of Appeals in its original opinion. Thus the Court of Appeals admitted that whether Maria "had been legally divorced from * * * [Munio] is not determinable from the record" (R. 393, fn. 1). But if that question is not determinable, then how could the jury be expected to pass on it and the other questions which instruction No. 22 put to them? In short, the government, by that instruction, asked the jury to conclude that Maria and Munio had not been divorced and hence could not validly remarry, but failed to place evidence in the record sufficient to reach a conclusion one way or the other. Nonetheless, the court ruled that "the jury will have to determine what the situation is" (R. 305).

It is elementary that an instruction to the jury must have some evidence in the record supporting it. Lacking

such evidence, the instruction does not assist the jury "in coming to correct conclusions, but its tendency is to embarrass and mislead them. It may induce them to indulge in conjectures, instead of weighing the testimony." *United States* v. *Breitling*, 20 How. 252, 255, 15 L. Ed. 900, 902 (1858). *Cf. Meyer* v. *United States*, 258 Fed. 212, 216 (C. A. 7th, 1919); *Chambliss* v. *United States*, 218 Fed. 154, 157-58 (C. A. 8th, 1914).

With respect to petitioners' second contention, the law is settled that where two marriages are shown the second is presumed to be valid. The party attacking the second marriage must therefore rebut a strong initial presumption in favor of its validity. In Illinois the rule has been authoritatively expressed in *In re Estate of Dedmore*, 257 Ill. App. 519, 522 (1930), and *Potter* v. *Clapp*, 203 Ill. 592 (1903). Federal courts which have considered the problem have reached the same conclusion. *Walker* v. *United States*, 180 F. 2d 217, 219 (C. A. 7th, 1950), *Briggs* v. *United States*, 90 F. Supp. 135, 141-42 (Ct. Cl., 1950), *United States* v. *Green*, 98 Fed. 63 (C. C. Iowa, 1899), *Marris v. Sockey*, 170 F. 2d 599, 603 (C. A. 10th, 1948).

The decision perhaps most directly in point is *Prentis* v. *McCormick*, 23 F. 2d 802 (C. A. 6th, 1928). That was an appeal from a decision of the trial court discharging the appellee from arrest for supposed violations of the immigration laws. The petition pleaded appellee's entry into the United States from England in 1921 and her marriage later in that year to a United States citizen. If that marriage was valid, then, under existing law, appellee became a citizen and was not subject to deportation. The immigration authorities, by way of answer, alleged that the appellee had been previously married in England and had never been divorced or legally separated from her first husband. They also asserted that appellee had ad-

mitted committing the crime of bigamy prior to her entry into the United States.

Taking the facts as they appeared in the pleadings, the court affirmed the district court's finding that the appellee was entitled to discharge, and at page 803 it wrote:

> She had gone through the form of marriage to an American citizen, a presumably legal marriage. That she had been married in 1911 to Avann and had never been divorced from him is also admitted; but those facts, in the absence of a showing that Avann was living when she married the second time, do not show the second marriage to have been bigamous, as against the formal ceremony thereof, in favor of which there is a presumption of validity.

These rules with respect to the presumption in favor of the second marriage and the burden upon the attacking party of overcoming that presumption were disregarded by the trial court. Both Munio and Maria were clearly alive. What was not clear was whether they had been legally divorced. That question necessarily depended upon evidence concerning the effect of a rabbinical divorce in Hungary in 1942 as between two Polish nationals who had been married in Poland in a ceremony performed by a Rabbi. The government presented no such evidence; and although the prosecutor prevented Maria from testifying with respect to the rabbinical divorce (R. 73, 78), he put that divorce squarely into the case by his opening statement (R. 23):

> The Government expects to show and submits it will prove that in December, 1932, in Poland, the defendant Munio Knoll was married to this third alien who came into the United States, Marie Irene Knoll Lutwak; that in 1942, after having lived together for ten years as man and wife, these two persons obtained, during the war, what is known as a rabbinical divorce in Budapest * * *.

The only evidence the government introduced as to the divorce was contained in Munio Knoll's statements to the immigration and naturalization authorities (Gov't Exs. Nos. 13 and 14, R. 281-82). No evidence of any nature was submitted to show that that divorce was ineffectual. Consequently, it is obvious from the record that the government did not present evidence sufficient to overcome the presumption in favor of the second marriage, a presumption which goes so far as to presume a divorce dissolving the first marriage even in the absence of any evidence of such a divorce. *In re Estate of Dedmore*, 257 Ill. App. 519, 522 (1930).

Thus the government secured an instruction on one of the crucial issues of the case—involving the validity of two of the three contested Paris marriages—in the absence of evidence to sustain it and in the face of a legal presumption directly applicable to the facts of record. The giving of such an instruction, over strenuous objection, was prejudicial error. That the instruction influenced the jury is apparent from the verdicts themselves: the one Paris marriage not touched by the instruction—that between Leopold Knoll and Grace—was the only one apparently regarded by the jury as valid, since Leopold was acquitted.

Conclusion.

The decision of the court below establishes startling changes in the law of evidence. If permitted to stand it will tear down and destroy historic evidentiary barriers, widen the already broad conspiracy dragnet, and obliterate protections inherent in the marital relationship which have existed continuously through many changing periods since the beginning of the common law. The destruction of these safeguards is not justified either by reason or by experience. Finally, its approval of the use of presumptions con-

flicts with firmly established principles governing the burden of proof in criminal cases and permits non-existent presumptions to take the place of facts essential to conviction.

This Court should emphatically disapprove this decision which in virtually all respects is patently erroneous.

We earnestly urge that the judgments below be reversed.

Respectfully submitted,

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